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No. 08-482

Supreme Court, U.S.
FILED
OCT 15 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARCUS A. BORDEN,

Petitioner,

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK; BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK; AND DR. JO ANN MAGISTRO, SUPERINTENDENT, SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN FOOTBALL COACHES ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The American Football Coaches Association ("AFCA"), founded in 1922, is the primary professional association for football coaches at all levels of competition – professional football, college football, high school football, and youth football. The AFCA has grown to over 10,000 members, including coaches from Canada, Europe, Australia, and Asia. Past presidents of the AFCA include the legendary John Heisman (from whom the Heisman Trophy takes its name), and respected coaches like Paul "Bear" Bryant, Darrell Royal, and Bo Schembechler. The international headquarters for the AFCA, in Waco, Texas, includes a memorial plaza that honors men of influence – football coaches. This "Plaza of Influence" was inspired by the countless coaches who have encouraged, motivated, and influenced the millions of boys and young men who have played the game of football. Inscriptions on plaques, benches, bricks, and tiles are testimony to the many ways that young lives can be touched and forever changed by a football coach.

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[1] This brief has been exclusively authored by counsel for *amicus curiae* as indicated on the cover of the brief, none of whom are attorneys for any of the parties to this litigation. There was no monetary contribution to the preparation or submission of this brief made by any person or entity other than the *amicus curiae*.

This *amicus curiae* brief is being filed in compliance with Rule 37.2(a)'s notice requirement, and with the written consent of all parties.

The improvement of the coaching profession has always been one of the AFCA's top priorities. The AFCA's interest in the present case is evident in the AFCA Constitution, which indicates that the AFCA was formed, in part, to "maintain the highest possible standards in football and the profession of coaching," and to "provide a forum for the discussion and study of all matters pertaining to football and coaching." A federal court decision ruling that it is unconstitutional for a coach to show respect to his players by bowing his head when those players choose to pray in advance of a football game "pertains to football and coaching." Regardless of one's faith, any rule that precludes coaches from engaging in basic human decency undermines "the highest possible standards in . . . the profession of coaching." But even more than the AFCA Constitution, it is that Plaza of Influence that demands AFCA participation in this lawsuit. The most important role coaches play is to be a positive influence in young lives. When the federal courts interpret the Constitution in a way that intrudes into the locker room, invades the player-coach relationship, and undermines a coach's ability to maintain an atmosphere of mutual respect and team unity by showing deference to the prayers of this nation's youth, that concerns the AFCA. The AFCA Board of Directors unanimously voted to authorize the filing of this *amicus curiae* brief at its annual summer meeting in Phoenix, Arizona, on May 5, 2008.

REASONS FOR GRANTING THE WRIT

This Court Should Grant the Petition for Certiorari and Clarify What the Establishment Clause Permits Public School Coaches to Do When Their Players Initiate Team Prayer.

For the thousands who coach it, and the millions who play it, football is more than just a game of touchdowns and field goals, wins and losses, and championship seasons. Football teaches commitment to a team goal, perseverance in the face of adversity, and the importance of planning and preparation to ultimate success. It rewards competitiveness on the field, yet promotes camaraderie off the field. Football encourages players to develop physical fitness, mental toughness, and strength of spirit. With its focus on good practice habits and consistency, football vividly shows student-athletes that hard work and dedication lead to improvement and increased chances of success, not only on the athletic field but in any of life's endeavors, whether of a professional or personal nature. Thus, football is not just a microcosm of life, football is *preparation for life*. Indeed, for the boys and young men who play it, it *is* life – an important rite of passage from adolescence to adulthood.

Given the important role that football plays in the lives of those who play it, and the seriousness of purpose required by the sport, it is hardly surprising that player prayer has become indelibly a part of football. When life gets serious, people pray. When

life transitions from one stage to the next – graduation, marriage, parenthood, retirement, death – people pray. There is a reason why persons are not typically moved to pray before playing monopoly, or bridge, or a round of golf with friends, but frequently *are* moved to pray immediately prior to or after playing a high school or college football game. It's not just the violent nature of the sport and the ever-present possibility of serious and perhaps life-altering injury; it's also the sense that these games are important signposts marking the road to becoming an adult. But whatever the reasons, football players pray.[2]

The Third Circuit's decision in *Borden v. East Brunswick*, 523 F.3d 153 (3rd Cir. 2008), especially when read in light of questions arising as a result of this Court's ruling in *Santa Fe v. Doe*, 530 U.S. 290 (2000), has put this nation's public high school and university coaches in a quandary when their players do what football players will routinely do as part of pre-game or post-game rituals – pray, pray together, and pray out loud. The Third Circuit in *Borden* interpreted *Santa Fe* to constitutionally prohibit a public school coach from engaging in a simple

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[2] According to a recent AFCA survey in which 300 college and high school football coaches participated, 95% of football teams reported that players engage in some form of vocal, collective, game-day prayer in a team setting; and 85% reported participation by the *entire team*. *See* "AFCA Team Prayer Survey & Results," Appendix A, Questions 1 and 6.

display of respect – taking a knee or bowing his head – during player-initiated prayers. *See* 523 F.3d at 176-178. If that is the law, the only legal "safe harbor" for a coach is to abruptly leave the presence of players as they begin to pray, effectively abandoning his team during what his players obviously perceive to be important game-related endeavors. The coach cannot prohibit players from praying (not that any coach would want to) without violating the constitutional rights of the players. *See Santa Fe*, 530 U.S. at 302. Neither can a coach "participate" in player prayers without violating the Constitution. *See Doe v. Duncanville*, 70 F.3d 402, 406 (5th Cir. 1995). Now, according to *Borden*, a coach who merely shows respect for his players' decision to pray, by taking a knee or bowing his head, can be held in violation of the Constitution. *See* 523 F.3d at 176-178. Indeed, even a coach who stands by stoically while his players pray could be accused of monitoring whether players are participating, thereby improperly "coercing" reluctant team members to join those team leaders who initiate the prayer. *See Lee v. Weisman*, 505 U.S. 577, 590, 592-593 (1992) (school officials, by monitoring student prayer, can cause the "subtle" or "indirect" coercive pressure that is constitutionally forbidden). The most constitutionally sound practice, apparently, is to walk out on one's players.[3]

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[3] Walking out, of course, could be construed as reasonably communicating a message of disapproval or hostility toward religion, which this Court says is *also* inconsistent with the

(Continued on following page)

The current unsettled and somewhat confusing state of Establishment Clause law puts coaches between a rock and a hard place. Choosing what may be the legally safest path – leaving the presence of praying players and thereby giving the appearance of abandoning them in serious, reflective pre-game or post-game moments – projects fearfulness and hyper-sensitivity rather than leadership, and threatens to undermine the relationship between players and coaches. On the other hand, to practice basic human decency by respecting the religious display of others – by bowing one's head or taking a knee (or simply remaining on a knee when the coach's pep talk ends and a player-initiated prayer begins) – risks a violation of the fundamental law of the land. The AFCA respectfully urges this Court to grant the Petition and clarify that effective leadership of this nation's youth, and the demonstration of basic respect for the

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Establishment Clause. *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The record in this case (specifically, the joint appendix filed in the Third Circuit) reveals that Coach Borden's players felt awkward and uncomfortable during the 2005 season when their coaches would freeze during player-initiated prayers. J.A. 169; 440-442. The players believed it hurt team morale. J.A. 169. Because this Court has condemned governmental conduct having the primary effect of advancing *or* inhibiting religion, *see Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), surely the sensitivity of students to what reasonably appears to be governmental *hostility* to religion is as constitutionally significant as the sensitivity of students to what reasonably appears to be governmental *endorsement* of religion.

prayers of this nation's youth, is not at odds with the Constitution.

The football coaches of America have no desire to flaunt federal law. Quite to the contrary, coaches uniformly stand for the proposition that individual desires must give way to rules that promote the good of the team. Disciplined adherence to rules – including the rule of law – is what good coaches demand of the young men under their tutelage. But coaches sorely need this Court's guidance and, by their *Amicus Curiae* Brief in Support of the Petitioner, seek to convey both the significance of the problem and the urgency of the need for this Court's intervention. It is difficult for football coaches, even with the advice of counsel, to see the sideline clearly (if at all) in an area of constitutional law where the textual "Congress shall make no law respecting an establishment of religion" has become, at least in large chunks of the nation, "Football coaches shall make no physical movement that shows respect for their players' prayers."

The expansion of Establishment Clause law to a point where it is now several football fields away from the text ("Congress" = "football coach"? "Make no law" = "make no physical movements"? "Establishment" = "showing deference and respect"? "Religion" = "player-initiated prayer"?) may reflect the possibility that mistakes have been made along the way. But even treating prior judicial fumbles as precedential water under the *stare decisis* bridge, the resulting elasticity of constitutional text has produced a troublesome

lack of clarity as to where the "out-of-bounds" lines are located. Consequently, coaches experience a frustrating inability to remain in confident compliance with the law, even in regard to those routine interactions between players and coaches that lie at the heart of this case.

The football coaches of America would benefit from a decision by the Court to review this case and announce that it is not unconstitutional for coaches to remain present and take a knee or bow their heads when their players initiate game-related prayer. By reducing the likelihood of federal judicial intrusions into the locker room, this Court would be providing coaches the autonomy so necessary in building mutually respectful relationships with their players. By reducing the pressure on school districts (who are understandably concerned about litigation) to overregulate their coaches' locker room activities, the Court would be promoting amicable relationships between coaches and their institutional supervisors. Additionally, by clarifying what is permissible for coaches, so that coaches' behavior does not inadvertently convert what would otherwise be student-initiated and protected prayer into the school-sponsored prayer prohibited by *Santa Fe*, the Court would be preserving breathing space for the rights of student-athletes to pray. Finally, by providing guidance to the nation's judges, the Court can foster a legal environment whereby the respect permissibly shown by coaches toward player-initiated prayer does not vary from coach to coach, from institution to

institution, or from region to region. A decision by this Court for Coach Borden will ensure that in *all* educational institutions, coast to coast, public or private, in whatever sport, this nations' *coaches* – and not its *courts* – will decide how best to display respect, to build mutual trust, to inspire selfless commitment to shared goals, and to foster growth in maturity as an athlete, as a teammate, and ultimately as a citizen.

A. The Issue in this Case Impacts Hundreds of Thousands of Public School Coaches and Affects the Unique Relationships Those Coaches Forge with Millions of this Nation's Youth at Critical Points on the Road to Maturity.

There are over 100,000 football coaches in this country,[4] a majority of whom are coaching at public educational institutions bound by the First Amendment. Of course, coaches of every other team sport are similarly impacted by the issue at the heart of Coach Borden's Petition for Writ of Certiorari. Those hundreds of thousands of coaches are responsible for

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[4] *See* Appendix B. The numbers in Appendix B do not include the thousands coaching football at grade schools, junior highs, and community colleges. Nor do they include those coaching baseball, basketball, softball, soccer, hockey, wrestling, gymnastics, tennis, golf, track and field, cross country, volleyball, etc. The total number of public school coaches, from grade school through college, surely is in the millions.

the leadership and training of millions of grade school, high school, and college athletes. With the influence of Title IX and the increasing participation in team sports of girls (and young women) at all levels of education, completing one's education *without* participation in team sports is fast becoming the exception rather than the rule.

Football and team prayer go together as naturally as touchdowns and extra points. At all levels of football, prayer before pre-game meals and prayer in the locker room prior to running out on the field is as routine as the pre-game warm-up. Though football is certainly not the only team sport in which athletes are motivated to engage in vocal team prayer on game days, football may be unique in its ability to inspire its players to pray. Football is a contact sport, arguably resulting in the most routinely violent contacts of any team sport played at the high school and college level. Football is perhaps also unique in the degree of interdependence required for the 11 players on the field to function effectively as a team. But whether players are motivated to pray primarily because of the rigors and dangers of football, or whether they are motivated primarily by a concern that they not "let their teammates down," players will pray on game day. Whether they are praying for protection or confidence or team unity or ultimate success, players will be praying on game day. And, because team unity is promoted by praying together, players will pray not just silently by themselves but collectively and vocally, often holding hands.

Due to the nature of football and the timing of when players normally decide to engage in collective vocal prayer, coaches will always be nearby, and will typically be in the immediate presence of their praying players.[5] Thus, the issue that prompted Coach Borden to pursue a declaratory judgment is one that will inevitably and repeatedly confront virtually every public school football coach in the land: "How do I, without violating the Constitution, show respect for my praying players and demonstrate that I stand in unity with them and in support of them as they solemnly prepare for the difficult and potentially dangerous task that lies ahead?"

A football coach is not just a taskmaster. A coach is a leader. The goal of coaching is to affirm, to encourage, to mentor, to teach. Indeed, for the increasing number of boys and young men who grow up in a home lacking the consistent presence of a positive male role model, a football coach not infrequently becomes the most important father figure in a young life. But even if one artificially restricts the role and impact of a coach solely to matters of football, mutual respect and team unity are critical in playing the game of football successfully. Bowing one's head or taking a knee during player-initiated prayer signifies

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[5] *See* "Survey," at Appendix A, Question 2 (95% of respondents – 282 of 297 – reported that coaches are typically present and in view of praying players at those times when players engage in vocal collective prayer in team settings on game day).

a coach's respect for his players and his unity with them as they prepare for the impending battle on the football field. Because promoting mutual respect and team unity among players and coaches is critical to team sports, especially so in football, the decision of a coach to bow his head or take a knee in the pre-game context is much more about coaching than it is about religion.[6] It's much more about *leader*ship than it is about *wor*ship. And it's much more about *football* leadership than it is about *spiritual* leadership. A coach should be permitted to act like a coach, especially immediately prior to what players, coaches, and fans view as the ultimate test of the sport – the games themselves. Denying coaches the permission to take a knee or bow their head when their players pray on game day is denying coaches the ability to promote team unity and mutual respect at a critical time;[7] it is denying coaches their stature as a leader of youth;[8] indeed, it is nothing less than denying coaches their ability to coach.

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[6] Indeed, even coaches who are non-believers will routinely bow their heads in respect. *See* "Survey," at Appendix A, Question 11 (94% of coaches agreed with proposition).

[7] *See* "Survey," at Appendix A, Question 8 (85% of coaches considered the inability to take a knee or bow their head while in the presence of praying players to be "a threat to player morale, team unity, and/or a mutually respectful relationship between players and coaches").

[8] *See* "Survey," at Appendix A, Question 9 (85% of coaches believed that the inability to take a knee or bow their head while in the presence of praying players undermined their "role as a leader of young men").

When the Constitution actually clashes with effective coaching, it is of course the Constitution that must remain supreme. When school officials truly are coercing student prayer, the sensitivities of the dissenting individuals, even if small in number, trump the majority's desire to pray. *See Lee v. Weisman*, 505 U.S. at 592-593. And when strong evidence of school sponsorship contradicts claims that prayer is student-initiated, this Court has ruled that the few offended have a right to shut down the desires of the vast majority. *See Santa Fe*, 530 U.S. at 302-310. Perhaps this is as it should be in a nation that attaches such a strong value to *individual* religious freedom. But when prayer is truly student-initiated and thus an expression of the free exercise rights of *private individuals*, any serious concerns about the sensitivity of the few present who may take offense, or who may feel pressure to participate despite their reluctance to do so, are no longer properly the concerns of the First Amendment and the courts. Thus, when a coach shows respect to a player-initiated prayer, no matter whether it involves the entire team, or most of the team, or a small part of the team, this surely is a time when a coach's desire to foster unity and mutual respect should survive the individual preferences and sensitivities of those few who may feel uncomfortable during the prayer.

A coach's autonomy in interacting with his team is vital to effective coaching. The AFCA simply seeks a signal from this Court that the Establishment Clause concerns, if any, triggered by bowing one's

head or taking a knee during player-initiated prayers, are too insignificant to interpret the Constitution to prohibit such innocuous displays of decency and respect. The one-size-fits-all policy that will be the natural result of cases like *Borden* – whereby coaches must stand by motionless and expressionless or leave the praying players' presence – is a policy that effectively orders coaches to take a "time out" from coaching at a time when they are in the face-to-face presence of their players at an event central to the player-coach relationship. That is humiliating to players and coaches alike.

It could be argued that what the Third Circuit's ruling lacks in sensibility it gains back in simplicity – after all, what could be more simple than a rule that requires coaches either to act like a robot or to retreat whenever player-initiated prayer happens? But one wonders, what's next? Without meaningful limits on the scope of Establishment Clause prohibitions, there will be no limit to just how sensitive (and how litigious) the religion-intolerant may become. Will coaches be sued (or threatened with sanctions by lawsuit-phobic school districts reacting to parental complaints) for telling players that they have "God-given talents" and coaching them to get the most out of such talents? For telling players that to whom much is given much is expected? If a player dies during the season in an automobile accident, will coaches be sued for organizing the team's attendance at their stricken teammate's funeral and burial? For bowing their heads with the rest of the team during a prayer

at the grave site? If a player without a father figure approaches the coach after practice, while other teammates are still present, and asks the coach to pray with him because his mother has just been diagnosed with cancer, must the coach decline because he is still operating on the school's nickel? Indeed, even Knute Rockne's legendary "Win One for the Gipper" speech might invite a lawsuit if delivered at a public high school or university in today's legal environment. In extolling his team to beat a superior opponent in memory of George Gipp (one of college football's all-time great players, who had died tragically at the end of his senior season several years earlier), Coach Rockne told his players that the Gipper would be watching. Because the context reasonably implied that the Gipper was in heaven, was Coach Rockne endorsing religion?

In sum, given the millions of public school participants in team sports, given the importance of the player-coach relationship to the maturation of the nation's youth, given the frequency with which those young persons will choose to pray prior to competition because of the solemnity and seriousness with which players approach the game, given the constitutionality of the players' decision to pray, given the mutual respect and team unity fostered by a coach bowing his head or taking a knee in response to player-initiated prayer, and given the uncertainty fostered by the current legal environment, this case is more than worthy of this Court's attention. By deciding this case, the Court can return the locker room to

America's coaches and players, entrust coaches with player-coach relationships, put an end to the humiliating inability of coaches to role model basic human decency and respect, and free coaches up to do what they have long done well – lead this nation's youth into adulthood.

B. The Current Legal Landscape Defies Honest Efforts By Coaches, Schools, and Courts to Navigate It Successfully.

The nation's coaches, schools, and courts need this Court to answer the following question: When students engage in what is truly student-initiated and therefore constitutionally protected prayer, what does the Establishment Clause permit public school coaches and teachers to do? *Santa Fe* does not answer this question because the Court in *Santa Fe* ultimately ruled that the student-delivered prayers in that case were not truly student-initiated, but rather were affirmatively school-sponsored due to the degree of official involvement. *See* 530 U.S. at 302-310. But what of prayers that truly *are* student-initiated and *not* school-sponsored? Coach Borden simply asked whether the Constitution permitted a coach to take a knee or bow his head, and he got three different answers from the Third Circuit panel: yes, no, and maybe.

The Third Circuit's splintered ruling raises more questions than it answers. If a coach is on constitutional thin ice merely by taking a knee or bowing his

head, is he similarly in danger of violating the Establishment Clause by taking off his hat? Or by temporarily halting a conversation with another coach so that the praying students may enjoy an environment of silence? Aren't all these displays of decency and respect of questionable constitutional propriety given the prevailing legal environment? Must coaches really act apathetically and disrespectfully toward the prayer in order to increase their chances of compliance with the law? Or, because governmental *hostility* toward religion is *also* constitutionally suspect, would such a strategy accomplish no more than to exchange endorsement suits for hostility suits?

Coaches' concern for their legal well-being is certainly not out of harmony with their players' own legal well-being. If "school-sponsored" prayer is prohibited under *Santa Fe*, and if the degree of governmental involvement can convert protected "student-initiated" prayer into prohibited "school-sponsored" prayer, then a coach's response to player-initiated prayer could conceivably, albeit inadvertently, undermine the players' right to pray. One of the problems posed by the *Santa Fe* analysis is that, in condemning the *Santa Fe* prayer as "school-sponsored" rather than truly "student-initiated," this Court highlighted a number of factors (*see* 530 U.S. at 307-308) that are *always* going to be present when public school athletes initiate vocal game-related prayers. The message, because it is a prayer, will necessarily have religious content; and

the athletes will never decide to turn the locker room into an open forum where all manner of social and political issues can be discussed. The prayers will always be delivered on government property in a location subject to the control of school officials. These prayers will always take place at government-sponsored, school-related events. The audience present will always be assembled as part of a regularly scheduled school function. Those players who choose to pray will always be subject to the ultimate supervision of the coaches. And the coaches will almost always be present when their players decide to initiate vocal team prayer. Add to all this "school involvement" the practical need for players to be informed by coaches at the beginning of the season about their right to pray if they so choose, and it becomes difficult under *Santa Fe* to determine how "student-initiated" (and protected) can avoid becoming "school-sponsored" (and prohibited) at the whim of any court. Under *Santa Fe*, simply informing students about their rights (in an educational environment!) can be constitutionally suspicious. How does a coach inform players of their right to pray without being accused of having a "policy" of endorsing prayer? At some point, there is a danger that all the talk about students' rights will become just that – talk.

There is also the question of whether coaches may wear any hat other than one of official capacity when they are in charge of students. Is a coach when coaching to be viewed as 100% state actor? Is there no part of the player-coach relationship where a coach

retains a small portion of his "private capacity"? Is he just a government mouthpiece and no more simply because he accepted employment with a public institution in order to dedicate his life to coaching and teaching our youth? Is a coach's one-on-one locker room prayer with a student who has just lost a loved one really to be regarded as a government prayer? If those representing the school are to be regarded as 100% state actor, couldn't that same theory be applied to the students who wear the school's colors and carry the school's name on their jerseys? If courts are unwilling to sacrifice student-athletes' rights to such a rigidly robotic theory of state action – *i.e.*, one that would deny private personhood to any who represent their public institutions – why is such an unrealistic view applied to coaches? Must even the small gestures of decency and respect displayed by Coach Borden be considered wholly state action as opposed to, at least in some small part, a private interaction between human beings who just happen to be representing their school in athletic competition? In short, why is Coach Borden all coach and no Borden?

The unsettled and confusing status of the law predictably has led to lower court arbitrariness. The Fifth Circuit in *Duncanville,* in its analysis of student-initiated prayer, drew a distinction between graduation ceremonies and athletic contests. *See* 70 F.3d at 406-407. According to the Fifth Circuit, athletic contests are less solemn and less significant than graduation ceremonies, thereby making any

degree of governmental involvement more constitutionally suspect. *See id.* It is not clear why courts should be approving or disapproving prayer based on the courts' own view of the solemnity or importance of occasions where citizens feel moved to pray. In any event, though graduation marks an important occasion, most graduations do not pose the possibility of serious injury to the participants, and graduation ceremonies rarely depend for their success on students performing difficult interdependent tasks with skill and precision in the face of intense physical resistance.

The arbitrariness of the Fifth Circuit's distinction between graduation ceremonies and athletic contests is matched by the vagueness of its line between permissible and impermissible coach behavior. According to *Duncanville*, coaches are not just permitted but are required to treat players' religious practices with "deference" and "respect"; but coaches may not "manifest approval and solidarity with" the players' religious practices. *See* 70 F.3d at 406 n.4. Continuing, the Fifth Circuit explained that, although coaches are properly enjoined from "participating" in student-initiated prayers, *see id.* at 406, coaches need not leave the praying students' presence or otherwise make their non-participation vehemently obvious. *See id.* at 406 n.4. The utter arbitrariness of *Duncanville*'s "standard" becomes apparent when trying to apply it to Coach Borden's practice of taking a knee or bowing his head during player-initiated prayer. His behavior easily fits the Fifth Circuit's description of

obligatory "deference" and "respect." It also easily fits the Fifth Circuit's description of prohibited "approval" and "solidarity." One judge might see Coach Borden's behavior as prohibited "participation," while the next might say that anything less participatory would be making his non-participation vehemently obvious, which the Fifth Circuit says is not required.

The Third Circuit's ruling creates an apparent conflict with the Fifth Circuit: The Fifth Circuit in *Duncanville* says that a coach need not make his non-participation vehemently obvious, *see* 70 F.3d at 406 n.4, but the Third Circuit's ruling in *Borden* effectively requires coaches to do so. Some coaches, that is. A requirement of vehemently obvious non-participation would be an extreme reading of the Establishment Clause, but at least it would seem to provide some clarity. The Third Circuit analysis, however, does not even do that. Instead, the determinative factor below was Coach Borden's "prayer history" as a coach. *See* 523 F.3d at 178-179. Thus, a coach with a certain kind of prayer history might have to make his non-participation vehemently obvious – and thereby undermine the atmosphere of mutual respect and team unity coaches try so hard to create – while a coach with a different kind of prayer history, or one without a prayer history, might remain free to do the decent and respectful thing by taking a knee or bowing his head. This is not only arbitrary and unpredictable (do coaches have to do a self-analysis of their prayer history?), it is patently inequitable in a way that could undermine competitive

balance. Because football performance is so dependent on the player-coach relationship, and because that relationship is enhanced by mutual respect and team unity, it plainly generates concerns about competitive balance when some coaches are more restricted than others in matters central to leadership.[9] The AFCA stands strongly for consistency. The rules should be the same for all coaches. Of course, because private and public schools often compete against each other, the only way to avoid dramatic differences in treatment is to read the Establishment Clause sensibly to permit public school coaches to display basic human decency and respect toward the game-related prayer practices of their players. The AFCA respectfully urges the Court to take the present opportunity to do so.

In conclusion, the current legal environment places the nation's public schools, players, and coaches in an untenable situation, but there is a way out. That "way out" would require this Court to grant the Petition in a case like the present one, but would not require the Court to substantially rework its Establishment Clause jurisprudence. Indeed, it would not require *any* of this Court's cases to be overruled.

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[9] *See* "Survey," at Appendix A, Question 10 (69% of coaches considered it a threat to competitive balance to permit some coaches to take a knee or bow their head during player-initiated prayers while denying that privilege to other coaches).

Simply by sensibly applying a rule discernable in both *Santa Fe* and *Lee*, this Court can clear up a lot of confusion and provide needed guidance, while at the same time staying true to the foundational Establishment Clause doctrines that the Court has repeatedly emphasized. According to *Lee* and *Santa Fe*, the Constitution prohibits prayers that "bear the imprint of the state" because of "the degree of school involvement." *See Santa Fe*, 530 U.S. at 305, *citing Lee*, 505 U.S. at 590. By deciding the instant case and distinguishing it from *Santa Fe,* the Court can provide a clear example of when the degree of school involvement is so minor – for example, a coach merely bowing his head or taking a knee in response to what is truly student-initiated prayer – that the prayer in no way "bears the imprint of the state."

A holding in favor of Coach Borden is not only easily reconcilable with *Santa Fe* and *Lee*, it could also reinforce foundational First Amendment theory. Viewing Coach Borden's respectful but innocuous gestures as themselves "private" rather than "public" would be consistent with this Court's pronouncement that teachers, like students, do not give up the entirety of their private personhood and lose all their rights as private citizens just by walking through the schoolhouse gate. *See Tinker v. Des Moines*, 393 U.S. 503, 506 (1969). But even if Coach Borden is viewed as "all coach, no Borden" (as 100% state actor), holding his respectful gestures to be constitutionally appropriate is consistent with the notion, often espoused in this Court's precedent, that there is

a range of permissible governmental "accommodation" of religion that is neither the *promotion* of religion nor the *hostility* toward religion that the Establishment Clause prohibits. In other words, reversing the Third Circuit's holding would undo the message that a degree of hostility may be necessary to safely avoid endorsement.

A decision for Coach Borden in this case would also reinforce the relevance of Establishment Clause text by refusing to read "make no law respecting an establishment of religion" to say "make no gesture displaying respectfulness to the prayers of others." Finally, such a ruling would be consistent with the Framers' desire to restrict "top down" enforcement of belief in order to protect "grass roots" religious practices of the type involved here. Whatever labels may be placed on Coach Borden's gestures – whether "public capacity," "private capacity," or "semi-private capacity"; whether "participation" or "non-participation"; whether expressing "respect and deference" or "approval and solidarity"; whether "endorsement" or "accommodation" – this case plainly does not involve the "top down" enforcement of belief that the Framers were targeting with the Establishment Clause. This case is not even in that ballpark.

CONCLUSION

For all these reasons, the American Football Coaches Association respectfully urges the Court to grant the writ of certiorari in order to decide the important issue posed by this case.

Respectfully submitted,

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APPENDIX A

AFCA TEAM PRAYER SURVEY & RESULTS (Survey of College and High School Coaches; Conducted in August, 2008)

Survey and results can be found at http://www.afca.com/ViewArticle.dbml?DB_OEM_ID=9300&ATCLID=1600166

*For purposes of this survey, "vocal collective prayer" means prayers joined in by multiple players on the team, where at least one person in the prayer group is praying out loud for all in the group to hear. (It does not require that the whole team be participating in the prayer group.)

1) Do players on your team engage in vocal collective prayer in *any* team setting (pre-game meal or locker room or field) on game days?

285 Yes 15 No (95% Yes)

2) Are coaches typically present and in view of the praying players at those times when players engage in vocal collective prayer in team settings on game days?

282 Yes 15 No (95% Yes)

3) Are vocal collective game-day prayers in a team setting typically initiated by the players themselves rather than the coaches?

174 Yes 144 No (55% Yes)

4) Do you as coach view vocal collective game-day prayers as making a positive contribution to a player's mental preparation for the game?

283 Yes 15 No (95% Yes)

5) Do you as coach view vocal collective game-day prayers as making a positive contribution to overall team unity?

283 Yes 13 No (96% Yes)

6) Is there any game day setting in which *the whole team* will gather together during a vocal prayer delivered (by either player or coach) so that the whole team can hear? (This is the only question on the survey where a yes answer requires the whole team gathered together during a prayer.)

257 Yes 43 No (85% Yes)

7) When your coaches are in the immediate presence of players who are engaging in vocal collective prayer, will they typically show deference and respect to the praying players such as by taking a knee or bowing their head?

279 Yes 12 No (96% Yes)

8) If coaches were not permitted to take a knee or bow their head during players' vocal collective prayers, but had to leave the players' presence or otherwise make their non-participation obvious, would you consider that a threat to player morale,

team unity and/or a mutually respectful relationship between players and coaches?

246 Yes 45 No (85% Yes)

9) If coaches were not permitted to take a knee or bow their head during players' vocal collective prayers, but had to leave the players' presence or otherwise make their non-participation obvious, would you consider that to undermine your role as a leader of young men?

254 Yes 44 No (85% Yes)

10) If you were not permitted to take a knee or bow your head during players' vocal collective prayers, but your opposing coach *was* permitted to do so, would you consider that a threat to competitive balance?

201 Yes 90 No (69% Yes)

11) To the extent that you have known of players or coaches on your team who were non-believers, has it been your experience that such players and coaches would nevertheless show deference and respect to those who were engaging in vocal collective game-day prayer, such as by bowing their heads or taking a knee?

274 Yes 18 No (94% Yes)

APPENDIX B

FOOTBALL COACH AND PLAYER DATA
(Compiled by AFCA, July, 2008)

Data can be found at http://www.afca.com/ViewArticle.dbml?DB_OEM_ID=9300&ATCLID=1600166

Key:
NCAA = National Collegiate Athletic Association
FBS = NCAA Football Bowl Subdivision (formerly "Division I-A")
FCS = NCAA Football Championship Subdivision (formerly "Division I-AA")
DII = NCAA Division II
DIII = NCAA Division III
NAIA = National Association of Intercollegiate Athletics
HS = High School

See table at page B-2 of this Appendix.

	FBS	FCS	DII	DIII	NAIA	HS**	Total
Football Teams	120	123	145	238	90	15,086	15,802
Ave. Coaches Per Team	11*	10*	8*	8*	8*	7	
Total Coaches	1,320	1,230	1,160	1,904	720	105,602	111,936
Head Coaches	120	123	145	238	90	15,086	15,802
Players***	12,000	12,300	14,500	23,800	9,000	1,131,484	1,203,064

*The averages used for the college divisions are based on data compiled as part of an AFCA survey conducted in June, 2008. The averages used are rounded down and therefore actually understate the total number of college coaches.

**High School team and player data provided by National Federation of State High School Associations; total high school coaches is based on a conservative assumption of 7 coaches per team.

***College player data assumes an average of 100 players per team.